SUPREME COURT, U. S.

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No. 1187

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

CLIFFORD JONES, *Petitioner,*

v.

HONORABLE OLIVER GASCH, Judge of the United States District Court for the District of Columbia, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the District of Columbia Circuit, filed in the above-styled case on November 7, 1967 (No. 20951), denying petitioner's petition for writ of mandamus.

OPINIONS BELOW

The memorandum opinion of the United States District Court for the District of Columbia is unreported and is printed in Appendix C to this petition. The

opinion of the Circuit Court of Appeals has not yet been reported; it is printed in Appendix A to this petition.

JURISDICTION

The order of the Circuit Court of Appeals here sought to be reviewed was filed on November 7, 1967 (Chief Judge Bazelon dissenting), with opinions to issue later. (App. B(1), *infra*) On November 14, 1967, petitioner moved the Circuit Court of Appeals to extend the time to petition for rehearing until thirty days after the opinions of the Court should issue. Said petition was granted on November 21, 1967. The opinions of the Circuit Court of Appeals issued on December 8, 1967. A timely petition for rehearing en banc filed January 8, 1968, was denied by order filed January 31, 1968. (App. B(2), *infra*) The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

This petition presents the following questions:

Whether petitioner, the defendant in a federal criminal proceeding, upon his motion for transfer pursuant to Fed. R. Crim. P. 21(b), was required to disclose the nature of the testimony of his contemplated defense witnesses as a prerequisite to having such individuals considered *as defense witnesses* for purposes of the court's determination of the convenience of witnesses.

Whether petitioner, the defendant in a federal criminal proceeding, upon his motion for transfer pursuant to Fed. R. Crim. P. 21(b), was required to demonstrate that his contemplated defense witnesses are

necessary witnesses to matters relevant to his defense as a prerequisite to having such individuals considered *as defense witnesses* for purposes of the court's determination of the convenience of witnesses.

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

U. S. Const. Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fed. R. Crim. P. 21(b) (1966)

For the convenience of the parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceeding as to him or any one or more of the counts thereof to another district.

STATEMENT OF THE CASE

Petitioner Clifford Jones has resided and practiced law in Las Vegas, Nevada, for the past thirty years. On March 17, 1965, pursuant to summons, petitioner appeared and testified before a grand jury sitting in the District of Columbia and inquiring into the affairs of Robert G. Baker. The grand jury indicted peti-

tioner on January 5, 1966, on three counts of perjury alleged to have occurred during the course of his testimony, each count charging a violation of 18 U.S.C. § 1621. Count One charged that petitioner knowingly testified falsely when he told the grand jury that he had not caused First Western Financial Corporation (a Nevada corporation, doing business in Las Vegas and elsewhere, of which petitioner was an officer and director and in which he had a substantial stock interest) to issue ten checks to Wayne L. Bromley, with the knowledge and purpose that Bromley would cash the checks and transmit the proceeds to Robert G. Baker. Count Two charged that petitioner knowingly testified falsely when he told the grand jury that he had never had a conversation in Bromley's presence wherein the payment of money to Baker was discussed, assertedly because such a conversation had in fact occurred on or about April 21, 1963, at the Thunderbird Hotel in Clark County, Nevada. Count Three charged that petitioner knowingly testified falsely when he told the grand jury that either he or First Western Financial Corporation or First Western Savings and Loan Association (a subsidiary of First Western Financial Corporation) had retained Bromley as a lawyer to perform services related to legislation and that Bromley had furnished legislative materials to petitioner.

Petitioner pleaded not guilty and thereafter on March 28, 1966, along with motions seeking other and different relief, moved to have his case transferred to the District of Nevada, or alternatively that his trial be continued until after the trial of Baker. The motion for transfer sought to invoke, prospectively, revised Rule 21(b) of the Federal Rule of Criminal Pro-

cedure (effective July 1, 1966),[1] inasmuch as the multivenue requirement of the then Rule 21(b)[2] could not be met, the alleged perjury having occurred, if at all, solely in the District of Columbia. District (now Chief) Judge Curran denied the motion for transfer, without prejudice, as being premature, but continued petitioner's trial until after Baker's trial.

Baker was convicted on January 29, 1967, and an appeal is pending from his conviction. On February 17, 1967, respondent District Judge Gasch heard argument on petitioner's renewed motion for transfer. He denied the motion in a memorandum opinion of April 11, 1967 (App. C). Both initially and when renewed, petitioner's motion to transfer showed by affidavit that forty Nevada residents had indicated their availability to testify as to his reputation for truth and veracity and that he wished to call twenty-nine Nevada or California witnesses to testify on the merits. The names, addresses and occupations of all proposed witnesses were supplied in the affidavit. Additionally, the affidavit showed that it would be a matter of substantial inconvenience and expense to petitioner and all his

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[1] Revised Fed. R. Crim. P. 21(b) (effective July 1, 1966) provides: "For the convenience of parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceeding as to him or any one or more of the counts thereof to another district."

[2] Before the 1966 revision, Fed. R. Crim. P. 21(b) provided: "The court upon motion of the defendant shall transfer the proceeding as to him to another district or division, if it appears from the indictment or information or from a bill of particulars that the offense was committed in more than one district or division and if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged."

witnesses should they be compelled to travel some 2,500 miles from Nevada to the District of Columbia to testify.

The government has represented that it intends to call twenty witnesses to testify on the merits, thirteen of whom reside in the vicinity of the District of Columbia.

Respondent, in weighing the convenience of the witnesses, effectively credited petitioner with no (zero) witnesses. Accordingly, respondent found the balance of convenience to be in favor of the government and denied the motion. Respondent disposed of all of petitioner's witnesses in the following fashion: As to the witnesses on the merits, he held:

> "Nowhere does the defendant [petitioner] disclose the nature of their [petitioner's witnesses on the merits] expected testimony nor does he provide an adequate basis to enable the Court to determine whether these individuals may even be properly classified as 'witnesses.' In fact, the limited disclosure made by the defendant leaves the Court with some doubt whether these 29 individuals will all be necessary witnesses to matters of relevance for the defense." (App. C, 36)

and as to the witnesses on petitioner's reputation for truth and veracity, he held:

> "The fact that some 40 individuals are willing to testify as to the defendant's [petitioner's] good character is not persuasive. It is well established that a trial judge may within his discretion limit the number of 'character' witnesses called by a defendant and sound judicial management would suggest that he do so." (App. C, 37)

Upon review, by means of petitioner's petition for writ of mandamus, which sought either a change in venue or remand to respondent with instructions as to the proper standards to be applied, the Court of Appeals left undisturbed respondent's finding that petitioner effectively had no witnesses to weigh in the balance of convenience, and upheld his denial of the motion for transfer as a sound exercise of discretion. (App. A, 22). This it did despite the finding that petitioner had disclosed the names, addresses and occupations of potential defense witnesses and at the hearing before respondent on the motion had "indicated in some degree the nature of the evidence witnesses on the merits were expected to furnish. Petitioner undertook a general showing on the materiality of the testimony of most of the witnesses named on his list." (App. A, 14)

REASONS FOR GRANTING THE WRIT

The writ should issue to insure the fair and sound administration of justice in federal criminal proceedings and more particularly to establish proper standards to be applied by federal courts when determining motions to transfer which invoke Fed. R. Crim. P. 21(b), as revised and effective July 1, 1966.[3] Here the respondent has ruled, and the Court of Appeals has acquiesced in the ruling, that the defendant in a federal criminal proceeding must, in effect, disclose in advance of trial the substance of his defense in order that he may have considered the convenience of his proposed witnesses on his motion for transfer; that is, the defendant, in order to have his proposed witnesses con-

[3] The text of the revised rule is set out at note 1, *supra*. The predecessor rule is set out at note 2, *supra*.

sidered *as witnesses* at all (much less to prevail on his motion for transfer), must disclose the nature of his witnesses' testimony and satisfy the trial court that his witnesses are in fact necessary to his defense.

Such a standard, if sanctioned by this Court, will thwart at the outset the effect intended to be secured by revised Fed. R. Crim. P. 21(b), in that it imposes a more restrictive test for transfer than ever was required under the rule before its revision. What is more important, however, there lurks in the standard imposed by respondent a requirement of doubtful constitutional validity regarding the disclosure that may be required of a defendant in a federal criminal proceeding.

The 1966 revision of Fed. R. Crim. P. 21(b) was intended, *inter alia,* to undo the effect of *Travis* v. *United States,* 364 U.S. 631 (1961), which had required that the accused in a federal criminal proceeding stand trial in the District of Columbia, far removed from his home and sources of proof in Colorado, solely because it was found that venue was literally proper only in the District of Columbia. See Notes of Advisory Committee on Rules, 18 U.S.C.A. Rule 21, 1967 Pocket Part, at 206. The revised rule is thus in harmony with, and implements, other decisions of this Court which favor the trial of criminal defendants in the vicinity of their homes and close to the sources of evidence on their behalf, including witnesses. *United States* v. *Cores,* 356 U.S. 405 (1958); *United States* v. *Johnson,* 323 U.S. 273 (1944); *Hyde* v. *Shine,* 199 U.S. 62 (1905).

The sole occasion for petitioner's indictment in the District of Columbia was his appearance, for the con-

venience and at the summons of the government, before a grand jury sitting here. And as appears from petitioner's indictment, the events about which he is alleged to have given perjured testimony occurred in Nevada. The most cursory comparison of the original with the revised Fed. R. Crim. P. 21(b) reveals that its chief characteristic after revision is the absence of the requirement that the venue of trial be laid at a place where the crime was committed. In place of the excised multi-venue requirement of the rule there was substituted for paramount consideration "the convenience of parties and witnesses." Respondent's purported balancing of the convenience of petitioner's and the government's witnesses involved his prior determination, effectively, that petitioner had no witnesses to weigh in the balance. This prior determination flowed from respondent's application of a standard which, with one possible exception discussed in the next paragraph, is without precedent and is hence a marked departure from settled federal law regarding motions for transfer in criminal cases. With the possible exception just noted, research demonstrates that in no case where convenience of witnesses has been mentioned or discussed, has a defendant been required, upon his motion for transfer, to disclose the nature of the testimony of his witnesses and to show that the witnesses he proposes are needed for his defense.[4]

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[4] *United States* v. *Austin Co.*, 273 F. Supp. 360 (S.D.N.Y.1967); *United States* v. *Wolfson*, 269 F. Supp. 621 (S.D.N.Y. 1967); *United States* v. *Hinton*, 268 F. Supp. 728 (E.D. La. 1967); *United States* v. *Pilnick*, 267 F. Supp. 791 (S.D.N.Y. 1967); *United States* v. *West Coast News Co.*, 357 F. 2d 855 (6th Cir. 1966); *United States* v. *Inches*, 253 F. Supp. 312 (D. Ariz. 1966); *United States* v. *Tremont*, 351 F. 2d 144 (6th Cir. 1965); *United States* v. *Luros*, 243 F. Supp. 160 (N.D. Iowa 1965); *United States* v. *Jessup*, 38 F.R.D. 42 (M.D. Tenn. 1965); *Minnesota Mining & Mfg. Co.* v.

In *Lindberg* v. *United States*, 363 F. 2d 438 (9th Cir. 1966), the court, in the second paragraph of a two paragraph opinion, said the following:

> "Defendant also complains of the denial of his Rule 21(b) motion for transfer of the proceedings to another district. The defendant did not support his motion with a showing of specific circumstances from which the district court could conclude that the proceeding should be transferred in the interests of justice. Thus, although defendant asserted that defense witnesses were located in the district to which transfer was sought, the witnesses were not named or otherwise described and the nature of their expected testimony was not dis-

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Platt, 314 F. 2d 369 (7th Cir. 1963), *rev'd* 376 U.S. 240 (1964); *United States* v. *Amador Casanas*, 233 F. Supp. 1001 (D.D.C. 1964); *United States* v. *U. S. Steel Corp.*, 233 F. Supp. 154 (S.D.N.Y. 1964); *United States* v. *U. S. Steel Corp.*, 226 F. Supp. 152 (S.D.N.Y. 1964); *United States* v. *Cohen*, 35 F.R.D. 227 (N.D. Cal. 1964); *United States* v. *Foster*, 33 F.R.D. 506 (D. Md. 1963); *United States* v. *Sorce*, 308 F. 2d 299 (4th Cir. 1962); *United States* v. *Suchman*, 206 F. Supp. 688 (D. Md. 1962); *United States* v. *Freeling*, 31 F.R.D. 540 (S.D.N.Y. 1962); *United States* v. *General Motors Corp.*, 194 F. Supp. 754 (S.D.N.Y. 1961); *United States* v. *Van Allen*, 28 F.R.D. 329 (S.D.N.Y. 1961); *United States* v. *Olen*, 183 F. Supp. 212 (S.D.N.Y. 1960); *United States* v. *Kimball Securities, Inc.*, 25 F.R.D. 172 (S.D.N.Y. 1960); *United States* v. *Rossiter*, 25 F.R.D. 258 (D.P.R. 1960); *Scott* v. *United States*, 255 F. 2d 18 (4th Cir. 1958); *United States* v. *Tellier*, 19 F.R.D. 164 (E.D.N.Y. 1956); *United States* v. *Valle*, 16 F.R.D. 519 (S.D.N.Y. 1955); *United States* v. *United States District Court*, 209 F. 2d 575 (6th Cir. 1954); *United States* v. *Warring*, 121 F. Supp. 546 (D. Md. 1954); *United States* v. *White*, 95 F. Supp. 544 (D. Neb. 1951); *United States* v. *Holdsworth*, 9 F.R.D. 198 (D. Md. 1949); *United States* v. *Erie Basin Metal Products Co.*, 79 F. Supp. 880 (D. Md. 1948); *United States* v. *Hughes Tool Co.*, 78 F. Supp. 409 (D. Hawaii 1948); *United States* v. *Eisler*, 75 F. Supp. 634 (D.D.C. 1947); *United States* v. *National City Lines*, 7 F.R.D. 393 (S.D. Cal. 1947); *United States* v. *Helwig*, 7 F.R.D. 187 (W.D. Pa. 1947); *Gates* v. *United States*, 122 F. 2d 571 (10th Cir. 1941).

closed. It was not an abuse of discretion to deny a motion based upon so inadequate a showing." 363 F. 2d at 438-439.

This case was decided after a conviction and before revised Rule 21(b) became effective and it represents the single instance known to petitioner where it has been suggested that a defendant might be obliged to disclose the nature of the testimony of defense witnesses in order to have their convenience weighed upon a motion for transfer. A reasonable reading of the court's ruling suggests that it was the total deficiency of Lindberg's showing that prompted the decision rather than the single failure to disclose the nature of defense testimony. Here, of course, petitioner has disclosed the names, addresses and occupations of the witnesses he wishes to call *and* in some degree indicated the nature and materiality of their testimony. It is amply demonstrated therefore that respondent's insistence upon petitioner's showing the nature of defense testimony and the need for proposed defense witnesses is so radical a departure from accepted standards as to warrant inquiry by this Court as to its propriety.

The decisions of respondent and the Court of Appeals require of petitioner no less than that, as the price for consideration of his motion for transfer, he disclose well in advance of trial the substance of the testimony of witnesses he expects to call in his defense and that he affirmatively satisfy the respondent that the witnesses he wishes to call are in fact necessary to his defense. Both of the elements of disclosure required by respondent constitute the imposition of an unreasonable and improper standard for evaluating the merits of his motion for transfer because they run afoul of his right as an accused in a federal criminal

proceeding not to be required to supply the prosecution with evidence. Our jurisprudence quite unmistakably guarantees that an accused, upon a plea of not guilty, puts the prosecution to its proof upon every element of the offense charged, and that the accused may present evidence in his defense, if he chooses to do so at all, only after the government has revealed its entire case against him. The decisions of the courts below clearly offend these principles.

It is the further right of an accused, as a matter of positive law, that is, Fed. R. Crim. P. 21(b), to seek a change in the venue of his trial. The effect of the decisions below is to condition petitioner's exercise of his latter right upon his willingness to forego the protection of his former right—the right to remain silent. This may not be required of him. Accord, *Sherbert* v. *Verner,* 374 U.S. 398 (1963); *United States* v. *Simon,* 262 F. Supp. 64 (S.D.N.Y. 1966), *rev'd on other grounds,* 373 F. 2d 649 (2d Cir. 1967), *vacated as moot sub nom. Simon* v. *Wharton,* 88 Sup. Ct. 577 (1967); see *Steinberg* v. *United States,* 163 F. Supp. 590 (Ct. Cl. 1958).

Mr. Justice Douglas, joined by Mr. Justice Black, has heretofore expressed the concern that conditioning a defendant's exercise of a right accorded him by the Federal Rules of Criminal Procedure—in that instance, the right to discovery under Fed. R. Crim. P. 16(a) or (b)—upon his willingness to submit to discovery—pursuant to Fed. R. Crim. P. 16(c)—posed a serious constitutional question.[5] Mr. Justice Douglas said:

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[5] Statement of Mr. Justice Douglas upon transmission to Congress of revised Federal Rules of Criminal Procedure, 383 U.S. 1089 (1966). Mr. Justice Black noted his concurrence in Mr. Justice Douglas' remarks at 383 U.S. 1082 (1966).

"In my judgment, the amendments to Rule 16 dealing with discovery require further reflection. To the extent that they expand the defendant's opportunities for discovery, they accord with the views of a great many commentators who have concluded that a civilized society ought not to tolerate the conduct of a criminal prosecution as a 'game.' [footnote omitted] But the proposed changes in the Rule go further. Rule 16(c) would permit a trial judge to condition granting the defendant discovery on the defendant's willingness to permit the prosecution to discover 'scientific or medical reports, book, papers, documents, tangible objects, or copies or portions thereof' which (1) are in the defendant's possession; (2) he intends to produce at trial; and (3) are shown to be material to the preparation of the prosecution's case. [footnote omitted]

"The extent to which a court may compel the defendant to disclose information or evidence pertaining to his case without infringing the privilege against self-incrimination is a source of current controversy among judges, prosecutors, defense lawyers, and other legal commentators. A distinguished state court has concluded—although not without a strong dissent—that the privilege is not violated by discovery of the names of expert medical witnesses whose appearance at trial is contemplated by the defense. [footnote omitted] I mean to imply no views on the point, except to note that a serious constitutional question lurks here.

"The prosecution's opportunity to discover evidence in the possession of the defense is somewhat limited in the proposal with which we deal in that it is tied to the exercise by the defense of the right to discover from the prosecution. But *if* discovery, by itself, of information in the possession of the defendant would violate the privilege against self-

> incrimination, is it any less a violation if conditioned on the defendant's exercise of the opportunity to discover evidence? May benefits be conditioned on the abandonment of constitutional rights? See, e.g., *Sherbert* v. *Verner*, 374 U.S. 398, 403-406, 83 S.Ct. 1790, 1793-1795, 10 L. Ed. 2d 965. To deny a defendant the opportunity to discovery—an opportunity not withheld from defendants who agree to prosecutorial discovery or from whom discovery is not sought—merely because the defendant chooses to exercise the constitutional right to refrain from self-incrimination arguably imposes a penalty upon the exercise of that fundamental privilege. It is said, however, that fairness may require disclosure by a defendant who obtains information from the prosecution. Perhaps—but the proposed rule establishes no such standards. Its application is mechanical: if the defendant is allowed discovery, so, too, is the prosecution. No requirement is imposed, for example, that the subject matter of the material sought to be discovered by the prosecution be limited to that relating to the subject of the defendant's discovery." 383 U.S. at 1089-1092.

Petitioner here has been forced to the very kind of choice that disturbed Justices Douglas and Black, a choice which they have indicated he may not properly be called upon to make.

Petitioner's plight, however, is even more aggravated and unfair than that of a defendant seeking discovery from the government. On a motion for discovery, a defendant receives the benefit of information in exchange for his relinquishing information of his own. But in the instant proceeding, petitioner's disclosure, if made, would not elicit a comparable disclosure by the government. Petitioner may not compel disclosure

of the names of government witnesses, much less the nature of their testimony. *Yeargain* v. *United States,* 314 F. 2d 881 (9th Cir. 1963). Hence the government may, as it has here, successfully resist a motion for transfer upon a lesser showing than is required of petitioner to permit him to prevail on his motion.

Although it may be true that the decisions below do not condition petitioner's right to seek a transfer upon an actual forfeiture of his Fifth Amendment rights, this Court, pursuant to its supervisory authority over the administration of justice in the federal courts, should not sanction procedures under Fed. R. Crim. P. 21(b) which so nearly transgress that right and which require of petitioner such an unfair and unequal disclosure of the nature of his defense prior to trial. *Cf. McNabb* v. *United States,* 318 U.S. 332 (1943).

As has been demonstrated, respondent has employed an unreasonable and improper standard of judgment in denying petitioner's motion for transfer. The Court of Appeals chose, however, to affirm respondent's ruling as being not an abuse of discretion. But testing a decision for possible abuse of discretion presupposes that the lower court's judgment was exercised in accordance with permissible and proper standards. Where, however, erroneous or improper standards are employed by the trial court, the question of abuse of discretion is beside the point, and the decision under review must be reversed and returned to the trial court for the application of proper standards of judgment. *Golconda Mining Corp.* v. *Herlands,* 365 F. 2d 856 (2d Cir. 1966) (by implication); *Chicago, R.I. & P.R. Co.* v. *Igoe,* 212 F. 2d 378 (7th Cir. 1954); *Wiren* v. *Laws,* 194 F. 2d 873 (D.C. Cir. 1951).

Inasmuch as the respondent's denial of petitioner's motion for transfer was guided by an improper standard, the Court of Appeals was under an affirmative obligation to reject that standard and to remand the case to respondent after announcing proper standards for judgment. It was not at liberty to affirm respondent's decision as a sound exercise of discretion. *Platt* v. *Minnesota Mining & Mfg. Co.*, 376 U.S. 240 (1964). Chief Judge Bazelon (dissenting) would have remanded on the authority of *Platt*.

CONCLUSION

For the reasons advanced above, this petition should be granted in order to insure the sound and fair administration of criminal justice in the federal courts and more particularly to insure the use of proper standards of judgment in determining motions for transfer under Fed. R. Crim. P. 21(b).

Respectfully submitted,

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APPENDIX